**Reynolds & Underhill, Inc. *and* International Brotherhood of Electrical Workers, Local 429.** Case 26–CA–16364

June 28, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

Upon a charge filed by the Union on August 30, 1994, the General Counsel issued a complaint on November 8, 1994, against Reynolds & Underhill, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) and Section 8(d) of the National Labor Relations Act. Copies of the charge and the complaint were properly served on the Respondent. The Respondent filed a letter purporting to be an answer to the complaint on December 12, 1994.

On March 13, 1995, the General Counsel filed a Motion for Summary Judgment, with exhibits attached. The General Counsel asserts, inter alia, that the Respondent's purported answer is deficient under the Board's Rules and Regulation and that, even assuming the Respondent's submission were to be considered to be a proper answer, the letter essentially admits the allegations of the complaint, raises no material issues of fact warranting a hearing, and none of the contentions in the purported answer constitute a valid defense to the allegations in the complaint. On March 15, 1995, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The complaint, in pertinent part, alleges at paragraphs 10–15 that:[1]

> 10. Since about February 28, 1994, Respondent has failed to utilize the contractual referral procedure.
>
> 11. Since about February 28, 1994 and continuing to date, Respondent has failed to make contractually mandated fund contributions.
>
> 12. Since about February 28, 1994 and continuing to date, Respondent has failed to pay contractual wages to its employees.
>
> 13. About July 29, 1994, Respondent, by letter, withdrew its recognition of the Union as the exclusive collective bargaining representative of the Unit.
>
> 14. Since about July 29, 1994, Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective bargaining representative of the Union.
>
> 15. By the conduct described above in paragraphs 10, 11, 12, 13 and 14, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective bargaining representative of its employees within the meaning of Section 8(d) of the Act and violation [sic] of Section 8(a)(1) and (5) of the Act.

The Respondent did not file an answer to the complaint within the 14-day time period set forth in Section 102.20 of the Board's Rules and Regulations.[2] On December 6, 1994, counsel for the General Counsel informed the Respondent by letter that an answer to the complaint had not been received, that the time for filing an answer was being extended to December 13, 1994, and that if no answer was filed by that deadline, the General Counsel would file a Motion for Summary Judgement with the Board, which, if granted, would result in all of the allegations in the complaint being deemed to be admitted to be true.

On December 12, 1994, the Region's Nashville Resident Office received a letter, dated December 7, 1994, from the Respondent, by Arthur S. Reynolds,[3] stating that ''I am going to try and answer the charges brought against my company the best I can without an Attorney. I have been unable to get one that does not want his money up front.'' The letter asserted, while responding directly to paragraphs 10–15 of the complaint, that:

> 10. The company has had no need for the referral procedure because the company has not han [sic] any jobs or contracts to use any of the men in the union referral pool.

[1] Although the complaint fails to allege the existence of a collective-bargaining agreement between the parties as a basis for certain of the 8(a)(5) findings sought here, we note that counsel for the General Counsel has appended the relevant agreement to the Motion for Summary Judgment, which is uncontroverted in this case. Moreover, the Respondent in its purported answer does not contest that it had a collective-bargaining agreement with the Union and indeed effectively admits that such a contract existed. In these circumstances, we do not find that the omission of this allegation from the complaint is sufficient to defeat the Motion for Summary Judgment.

[2] Sec. 102.20 of the Rules and Regulations states in full:

> The respondent shall, within 14 days from the service of the complaint, filed an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegations in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause is shown.

[3] The complaint alleges that ''Art Reynolds'' is the Respondent's president.

> 11. The company has not contributed to the fund for no IBEW #429 members have been on the payroll.
>
> 12. The company has not used any of the contractual wage employees to meet the requirment [sic] of the contract.
>
> 13. As the company did not have any jobs for the use of Union employees, we withdrew our contract.
>
> 14. The company has not received any new contracts from the Unoin [sic] to bargain from, as of today.
>
> 15. The company has not refused to bargain with the Union because the company has not received any new contracts from the Union to look at. So for [sic] the company has lost most of its job market because of loss of income and interest on funds borrowered [sic], and not being able to get the jobs bonded.[4]

On February 17, 1995, counsel for the General Counsel informed the Respondent, by letter, that the Respondent's letter dated December 7, 1994, was deficient as an answer under Section 102.20 and 102.21 of the Board's Rules, enclosed a copy of the applicable provisions, and informed the Respondent that unless a proper answer to the complaint was received by February 24, 1995, the General Counsel would file a Motion for Summary Judgment. The Respondent did not respond to counsel for the General Counsel's February 17 letter.

We find that the Respondent's letter does not constitute a proper answer under Section 102.20 because it fails to meet the substance of the complaint allegations and therefore is legally insufficient under the Board's Rules.[5] Moreover, even assuming that the Respondent's answer meets the Board's requirements, we agree with the General Counsel that the Respondent's statements there are insufficient to rebut the allegations of the complaint and do not otherwise raise any material issue of fact or law that would warrant a hearing in this case.

In this regard, we note that paragraphs 10, 11, and 12 of the complaint allege that during the term of the contract the Respondent failed to take actions required by the contract. The Respondent in its purported answer does not deny the failure to take these actions but essentially attempts to explain its failures to abide by the contract. It is well settled, however, that during the term of a collective-bargaining agreement an employer is prohibited from modifying the terms and conditions of employment established by that agreement without obtaining the consent of the union.[6] The Respondent's answer does not address this legal principle and its answer is legally insufficient to defeat paragraphs 10, 11, and 12 of the complaint.

Paragraphs 13 and 14 of the complaint allege that as of a specific date the Respondent withdrew recognition from the Union as its employees' exclusive bargaining representative and has since refused to bargain with the Union. Paragraph 15 then alleges a general refusal to bargain based on the Respondent's actions detailed in paragraphs 10–14. The Respondent's answer to the withdrawal of recognition allegation in paragraph 13 is a proffered reason for why it ''withdrew our contract.'' The reason offered is a legally insufficient basis on which to withdraw recognition, which is what the complaint alleges as a violation. The Respondent's answer to the specific and general allegation that it has refused to bargain with the Union is that it has not received any new contracts from the Union. It claims that because of this failure on the Union's part it has not refused to bargain. The alleged nonreceipt of new contracts, however, would not privilege the specific and general refusal to bargain alleged in the complaint and is a legally insufficient answer to the complaint allegations in paragraphs 14 and 15.

We therefore grant the General Counsel's Motion for Summary Judgment. Accordingly, we conclude that the Respondent has violated Section 8(a)(1) and (5) and Section 8(d) of the Act by unlawfully refusing to bargain as alleged in the complaint.

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, a corporation with an office and place of business in Burns, Tennessee, is engaged in commercial, industrial, and residential electrical contracting. During the 12-month period ending October 31, 1994, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 for various enterprises located in States other than the State of Tennessee. During the 12-month period ending October 31, 1994, the Respondent, in conducting its business operations, provided services valued in excess of $50,000 for T.W. Frierson's Contractors Co., Inc., a corporation with an office and place of business in Nashville, Tennessee, which has been engaged in providing commercial and industrial contracting services and which itself has performed services valued in excess of $50,000 in States other than

[4] Although counsel for the General Counsel asserts that the Respondent's letters were not served on the Charging Party, we note that they were filed pro se. See *Acme Building Maintenance*, 307 NLRB 358, 359 fn. 6 (1992).

[5] See *Breeden Painting Co.*, 314 NLRB 870 (1994); *Parisian Manicure Mfg. Co.*, 258 NLRB 203 (1981); *United Super*, 256 NLRB 1186 (1981); and *Lloyd's Laundry & Dry Cleaning*, 250 NLRB 1369 (1980). Cf. *M. J. McNally, Inc.*, 302 NLRB 120 (1991), in which the employer's pro se answer specifically denied the paragraph of the complaint that contained the operative facts of the unfair labor practices alleged.

[6] See, e.g., *Nick Robilotto, Inc.*, 292 NLRB 1279 (1989).

the State of Tennessee. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

About June 21, 1991, the Union was certified as the collective-bargaining representative of employees in the following unit that is appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

> All employees involved in electrical construction at the Employer's Burns, Tennessee facility, including journeymen, wiremen, residential wiremen and apprentices; excluding all other employees of the Employer, including office clerical employees, professional employees, guards and supervisors as defined in the Act.

At all times since June 21, 1991, the Union has been the exclusive collective-bargaining representative of these employees based on Section 9(a) of the Act. The Respondent and the Union were parties to a collective-bargaining agreement that was effective from September 1, 1991, until August 31, 1994.

Since about February 28, 1994,[7] the Respondent has failed to utilize the contractual referral procedure. Since about February 28 and continuing to date, the Respondent has failed to make contractually mandated fund contributions and to pay contractual wages to its employees. About July 29, the Respondent, by letter, withdrew its recognition of the Union as the exclusive collective-bargaining representative of the unit employees. Since about July 29, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of these employees. We find that by the conduct described above the Respondent has failed and refused to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) and Section 8(d) of the Act.

## CONCLUSIONS OF LAW

By failing to utilize the contractual referral procedure since about February 28; by failing to make contractually mandated fund contributions and to pay contractual wages to its employees since about February 28, and continuing to date; by withdrawing recognition from the Union as the exclusive collective-bargaining representative of the unit employees about July 29; and by failing and refusing to recognize and bargain with the Union since about July 29, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 8(d) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (5) and Section 8(d) of the Act, we shall order that the Respondent cease and desist from engaging in such conduct and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully withdrew recognition from the Union, we shall order the Respondent to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit employees. We shall also require the Respondent to utilize the contractual referral procedure that it has not done since about February 28, 1994. Additionally, we shall order the Respondent to make whole the unit employees for any losses they suffered by reason of its failure to pay contractual wages, such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall further order the Respondent to make whole the unit employees by making contractually mandated fringe benefit contributions that have not been paid in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). The Respondent shall also reimburse its employees for any expenses resulting from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, above, with interest as prescribed in *New Horizons for the Retarded*, above.[8]

## ORDER

The National Labor Relations Board orders that the Respondent, Reynolds & Underhill, Inc., Burns, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully withdrawing recognition from the Union and thereafter failing and refusing to recognize and bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative in the bargaining unit described below.

(b) Failing and refusing to utilize the contractual referral procedure, to make contractually mandated fund

[7] All dates are in 1994 unless otherwise noted.

[8] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employees, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

contributions, and to pay contractual wages to its employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with International Brotherhood of Electrical Workers, Local 429, as the exclusive representative of employees with respect to rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

> All employees involved in electrical construction at the Employer's Burns, Tennessee facility, including journeymen, wiremen, residential wiremen, and apprentices; excluding all other employees of the Employer, including office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) Utilize the contractual referral procedure provided for in the Respondent's collective-bargaining agreement with the Union.

(c) Make whole the unit employees, with interest, for any losses they suffered by reason of the Respondent's failure to pay contractual wages to its employees.

(d) Make whole the unit employees by paying all contractually mandated fund contributions that are presently delinquent and reimburse the unit employees for any expenses they incurred by reason of the Respondent's failure to pay such contributions, with interest.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Burns, Tennessee, copies of the attached notice marked ''Appendix.''[9] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

MEMBER COHEN, dissenting.

I would not grant summary judgment. In my view, the Respondent has tendered an answer that raises factual issues requiring a hearing. Concededly, the answer is inartfully drawn. This is not surprising, however, inasmuch as it was written without benefit of counsel. In essence, the answer avers that, during the relevant periods, the Respondent has not had any unit work to perform. Thus, it has not had occasion to use the Union's referral procedures. Further, if there were no unit employees, there was no one to whom contract wages were owed and no one for whom fund payments were to be made.

Concededly, the Respondent was not privileged to terminate its contract or to wait for a new proposal from the Union, even if it had no unit employees during the relevant periods. I note, however, that the General Counsel seeks complete, not partial, summary judgment. In addition, given the interrelationship of the various allegations, it would not be practical to grant summary judgment regarding some while litigating others.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unlawfully withdraw recognition from International Brotherhood of Electrical Workers, Local 429, and thereafter fail and refuse to recognize and bargain collectively and in good faith with this Union as the exclusive collective-bargaining representative of employees in the bargaining unit.

WE WILL NOT fail and refuse to utilize the contractual referral procedure, to make contractually mandated fund contributions, and to pay contractual wages to our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive representative of our employees with respect to rates of pay, wages, hours, and other terms and conditions of employment in the following appropriate unit:

> All employees involved in electrical construction at the Employer's Burns, Tennessee facility, including journeymen, wiremen, residential wiremen, and apprentices; excluding all other employees of the Employer, including office clerical em-

ployees, professional employees, guards and supervisors as defined in the Act.

WE WILL utilize the contractual referral system provided for in our collective-bargaining agreement with the Union.

WE WILL make whole the unit employees, with interest, for any losses they suffered by reason of our failure to pay contractual wages to the unit employees.

WE WILL make whole the unit employees by paying all contractually mandated fund contributions that are presently delinquent and WE WILL reimburse the unit employees for any expenses they incurred by reason of our failure to pay such contributions, with interest.

REYNOLDS & UNDERHILL, INC.